AND
BRIEFS

No. 15-118

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JESUS C. HERNANDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS JAMES E. PFANDER, CARLOS M. VÁZQUEZ, AND ANYA BERNSTEIN IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are law professors whose research and teaching focus on federal jurisdiction, and, specifically, this Court's *Bivens* jurisprudence. They file this brief to urge the Court to reverse the Fifth Circuit and recognize Petitioners' right to sue Agent Mesa for his unjustified use of force. *Amici* are:

James E. Pfander, the Owen L. Coon Professor of Law at Northwestern Pritzker School of Law, has written extensively on federal and state sovereign immunity, the early republic origins of official liability and indemnity, *Bivens* litigation, and the modern law of qualified immunity. A member of the American Law Institute, Pfander has served as the chair of the sections on civil procedure and federal jurisdiction of the Association of American Law Schools. He teaches conflicts of law and federal jurisdiction, among other subjects. His latest book, Constitutional Torts and the War on Terror (Oxford University Press) will appear in early 2017.

Carlos M. Vázquez is Professor of Law at Georgetown University Law Center. He has written extensively on sovereign immunity and official liability for constitutional violations, including *Bivens* claims, as well as the extraterritorial applicability of federal law. He is a member of the American Law Institute and serves as an adviser to the current Re-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae and its counsel, made any monetary contribution towards the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for both Petitioners and Respondent were notified of the intent to file this brief and the parties' letters of consent have been filed with the Clerk's office.

statement (Fourth) of Foreign Relations Law project. He has also served as chair of the Federal Courts section of the Association of American Law Schools. He teaches Federal Courts and the Federal System, Conflict of Laws, and Transnational Litigation, among other courses.

Anya Bernstein is Associate Professor of Law at SUNY Buffalo Law School. She has written about *Bivens* actions and congressional legislation; statutory interpretation; and administrative law and practice in the United States and in comparative perspective. She teaches civil procedure, administrative law, and legislation.

SUMMARY OF THE ARGUMENT

In *Boumediene* v. *Bush*, 553 U.S. 723, 771 (2008), this Court held that the Constitution's prohibition against suspension of the writ of habeas corpus "has full effect" at Guantanamo Bay, assuring judicial review of the claims of foreign nationals whom the government had seized and detained on foreign soil. Here, Jesus Mesa, acting in the course and scope of his employment for the U.S. Customs and Border Protection, seized Sergio Hernandez, a foreign national, in apparent violation of the Fourth Amendment's prohibition on the use of excessive force. No other country can regulate Agent Mesa's conduct in the United States and no other country's law offers Hernandez a clear remedy for the conduct at issue. Judged under the "practical" standard articulated in *Boumediene*, the Constitution governs Agent Mesa's actions along the border. Rejecting narrow territoriality, the *Boumediene* Court evaluated the nature and locus of the federal government's activities and the prospect that the application of federal constitu-

tional law would conflict with the laws of another country. Judged by the standard of *Boumediene*, the Fourth Amendment likewise governs Agent Mesa's decision to shoot Hernandez as he stood across the border in Mexico.

Centuries of common law developments in England and the United States confirm the lessons of *Boumediene* as to events outside the borders of the nation and underscore the importance of recognizing a right under *Bivens* to recover damages for government invasions of life, liberty, and property. Indeed, this Court's *Bivens* decision builds upon this deeply rooted common law tradition, providing a modern, post-*Erie* framework for the historic availability of damages remedies against federal officials. Although Congress has reshaped the common law tradition in various ways—by allowing garden-variety tort claims to proceed against the federal government itself under the Federal Tort Claims Act and by immunizing federal officials from such garden-variety tort liability in the Westfall Act—it has taken no steps to displace the *Bivens* right to sue for constitutional torts claims such as the one involved in this case. To the contrary, Congress has chosen explicitly to preserve the *Bivens* action for constitutional tort claims as the successor to the common law tradition of official liability.

Congress took this action most decisively in 1988, with the enactment of the Westfall Act. That Act immunized federal officials acting in their official capacity from state law tort claims. At the same time, the Westfall Act provided that the federal government was to be substituted as defendant in any such state law actions, thereby transforming such claims into proceedings governed by the FTCA. Congress, howev-

er, carved out claims brought against federal officials for "violations of the Constitution" from both provisions. Thus, Congress made no provision for the assertion of constitutional claims against the government under the FTCA, thereby retaining federal immunity from suit for such claims. In addition, Congress expressly provided that such constitutional tort claims should proceed, as recognized in *Bivens*, as suits brought against the officer in his or her personal capacity. This combination of congressional actions—eliminating the routinely available state common law action and expressly preserving constitutional tort claims—means that the *Bivens* claim provides the sole remedy for constitutional torts and the remedy Congress apparently chose as best adapted to the broader scheme of remedies.

By placing the *Bivens* action within a firm statutory framework, Congress effectively ratified the *Bivens* action as the only available remedy for constitutional torts. Congressional ratification should play a role in this Court's evaluation of the availability of a *Bivens* action. So long as this Court finds that the Constitution regulates the federal conduct at issue, the Westfall Act confirms that a *Bivens* action may proceed. This does not mean, needless to say, that every claimed constitutional violation will proceed to the merits. Established doctrines, including qualified immunity, impose important limits on such litigation. But it does mean that, in giving effect to the congressional design, this Court no longer need worry that the recognition of a right to sue improperly invades the legislative sphere.

In the present case, the absence of any remedial alternative—whether domestic or foreign—suggests that Petitioners indeed have a right to sue Agent Me-

sa for his use of excessive force in contravention of the Fourth Amendment's prohibition on unreasonable seizures. This Court has previously confirmed the availability of a *Bivens* action to redress Fourth Amendment violations and nothing in the context of this litigation calls for a different analysis.

ARGUMENT

I. THE FOURTH AMENDMENT GOVERNS MESA'S CONDUCT ALONG THE MEXICAN BORDER.

Federal officers acting within the United States, such as Agent Mesa, remain presumptively subject to the law of the United States. When a federal officer takes action overseas—or, as here, his conduct has overseas effects—and there is no conflict between U.S. and foreign law regarding the applicability of our constitutional principles, then this Court has applied the relevant constitutional rule with full effect. *Boumediene*, 553 U.S. at 755 (finding dispositive the "fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over" Guantanamo Bay, thus creating no possibility of conflict with Cuba's laws); cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (finding Fourth Amendment's warrant requirement inapplicable to search conducted in Mexico because a genuine conflict between the two countries' laws meant that projecting U.S. law into Mexico would be "impracticable and anomalous").[2]

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[2] *Verdugo-Urquidez* refused to apply the warrant requirement to a search conducted in Mexico but did not address the situation here. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (concluding that "the Constitution

Here, as in *Boumediene*, applying the Constitution[3] to Agent Mesa's conduct presents no threat of conflict between the laws of the United States and Mexico. Even a cursory review reveals that Mexican law bars the unjustified use of deadly force.[4] Indeed, Mexican authorities asked the United States to extradite Agent Mesa to face criminal charges in Mexico, evidence that Mexico regards Agent Mesa's actions as unlawful. Because the unjustified use of force was prohibited under both Mexican and U.S. law, application of the Fourth Amendment's unreasonable-seizures provision in this case poses no threat of conflict.[5]

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does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien.").

[3] This brief focuses exclusively on the Fourth Amendment, though Petitioners are correct that the Fifth Amendment also applies to Agent Mesa's conduct.

[4] Mexico's Constitution prohibits such conduct by law enforcement officials in Mexico. *E.g.*, Political Constitution of the United Mexican States, http://portal.te.gob.mx/sites/default/files/consultas/2012/04/political_constitution_v2_pdf_20009.pdf (last visited Dec. 8, 2016), art. 1 (guaranteeing that "all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights"); *id.* art. 29 (proscribing the restriction or suspension of "the right to life"); *id.* art. 21 (requiring "institutions in charge of public security" to respect these human rights); *id.* art. 1 (requiring government to "prevent, investigate, penalize and redress violations to the human rights").

[5] Although finding de facto American sovereignty over the culvert would further tip the scales in favor of applying the Fourth Amendment here, this Court need not go so far given the obvious lack of conflict between plausibly applicable laws in the United States and Mexico.

II. ENGLISH AND AMERICAN COMMON LAW HISTORICALLY RECOGNIZED A RIGHT TO SUE PUBLIC OFFICIALS FOR RIGHTS VIOLATIONS HOME AND ABROAD.

The common law tradition forged by Lord Mansfield, President James Madison, Justice Joseph Story, and Chief Justice John Marshall recognized, as a routine matter, public-official personal liability for tortious conduct against citizens and foreign nationals alike. Subsequent indemnification by private bill would protect the personal financial interests of the official while providing the injured party with due compensation. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1865–66 (2010). *Bivens* and the modern practice of routine indemnification are the natural extension of this well-established presumption favoring vindication of rights violations attributable to improper official conduct.

Indeed, *Bivens* can be best understood as providing a federal right to sue that builds on the common law past and tailors the right for use in a post-*Erie* world. See James E. Pfander, Iqbal, Bivens, *and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn St. L. Rev. 1387, 1415 (2010) ("*Erie* created the very real possibility that in tort suits aimed at enforcing constitutional rights, both the right to sue the federal official and the incidents of official liability would be governed by state law."); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. Pa. L. Rev. 509, 541 (2013) (noting that the decision to frame remedial issues in state law terms

after *Erie* "tied" the federal courts to "state precedents" and prevented them from taking account of "the federal interests involved, including the need to give efficacy to the Constitution"); see also James E. Pfander, *The Story of* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, *in* Federal Courts Stories 275, 284–85 (V. Jackson & J. Resnik eds. 2010) (describing impact of *Erie* concerns on the argument over recognition of a right to sue in *Bivens*).

A. English Common Law Tradition.

Common law rights of action against military and government officials under English law predated the American Revolution and permitted individuals to sue English officers whose tortious conduct exceeded official authority. See James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 Cornell L. Rev. 497, 510–12 (2006); see, *e.g.*, *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021 (1774) (opinion of Lord Mansfield). Importantly, British officers were subject to suit in English courts even when they acted abroad. See *Mostyn*, 98 Eng. Rep. at 1022 (Minorcan civilian successfully sued English military governor for damages for unlawful detention in and subsequent banishment from Minorca); see also Pfander, *Limits of Habeas Jurisdiction*, *supra* p. 8, at 511 ("[A]djudication by the superior courts at Westminster was seen as essential to prevent a failure of justice" when no alternative remedial forum was available to the injured party); *id.* at 510 ("[C]ivilian courts measured the legality of military and imperial action overseas by reference to the laws of Britain."). An officer could override the presumption in favor of applying English law, but only if he could show that he acted under the sheltering arm of another coun-

try's law that provided greater protections for his conduct. *Mostyn*, 98 Eng. Rep. at 1023.

B. American Tradition Through Early Twentieth Century.

The English tradition of presumptive personal liability for improper official conduct likewise was embraced in the early Republic. Pfander, *Limits of Habeas Jurisdiction*, *supra* p. 8, at 515; see, *e.g.*, *Wise* v. *Withers*, 7 U.S. 331, 337 (1806) (Marshall, C.J.) (upholding award of damages for trespass against military officers who improperly imposed a court martial against a citizen not subject to military jurisdiction). Thus, when a federal officer violated rights to life, liberty or property, the affected individual could seek redress through a common law tort claim against the officer in his personal capacity. For example, a victim of an unlawful search would sue under a trespass theory. If the official argued his conduct was authorized by federal law, the victim could counter that the Fourth Amendment prohibition against unreasonable searches invalidated any such claim of authority. If the court agreed, it would award damages. Officers were not entitled to immunity, but Congress commonly granted the officers' petitions for indemnification. See, *e.g.*, *Little* v. *Barreme*, 6 U.S. 170 (1804) (holding naval captain personally liable for illegal seizure of vessel); *Murray* v. *Schooner Charming Betsy*, 6 U.S. 64, 117 (1804) (same); see also Pfander & Hunt, *supra* p. 7, at 1900–02 (discussing Congress's indemnification of officers found liable in *Little* and *Murray*); David J. Barron & Martin S. Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689, 747 n.181 (2008) (noting $1,000 fine against General Andrew Jackson handed down

by federal court for his unconstitutional declaration of martial law during Battle of New Orleans, President Madison's endorsement of the penalty, and Congress's eventual indemnification of Jackson by private bill).

As with the British officers, routine remediation for harms caused by U.S. government officials extended to conduct beyond the borders of the United States. In the *Apollon*, for example, Justice Story concluded that U.S. revenue law did not authorize federal officials to seize French ships in foreign waters, but that general U.S. tort law did authorize the owners of the French vessel to recover damages from those officials in U.S. courts. 22 U.S. 362 (1824).[6] For Justice Story, applying U.S. revenue law to authorize such seizures would conflict with the settled expectations of maritime nations, interfere with other nations' rights to govern their own trade, and project U.S. regulatory authority beyond the (territorial) limits recognized in the law of nations. No such conflict arose, however, when foreign nationals brought suit in the courts of the United States to recover damages for unlawfully seized vessels. Here, Justice Story recognized that U.S. law was in sync with that of other interested nations (France and Spain), and with that of the law of nations generally: all would expect a country to make good on the loss imposed by its officials' unlawful seizure of another nation's vessel. This universal principle, combined with the long-standing common law presumption in favor of holding public officials accountable for their conduct regardless of location, led Justice Story to conclude that the common law pro-

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[6] Justice Story wrote the *Apollon* long before this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), barred federal courts from applying general common law principles.

vided a remedy for U.S. official conduct in foreign territory. See, *e.g.*, Act for the Relief of Paolo Paoly, ch. 27, 6 Stat. 47 (1802) (paying the judgment against U.S. naval officer who was held liable in damages for illegal seizure of a vessel owned by a foreign national); Act of March 2, 1799, ch. 28, 1 Stat. 723 (1799) (granting legislative indemnity and authorizing payment of compensation to a British national whose vessel had been illegally seized on the high seas by U.S. naval officer); *Maley* v. *Shattuck*, 7 U.S. 458 (1806) (upholding award of damages against U.S. naval officer for unlawful seizure of vessel owned by foreign national); *Little*, 6 U.S. 170 (foreign national entitled to tort damages from U.S. officer acting in violation of law on the high seas); see also Pfander & Hunt, *supra* p. 7, at 1885 n.98 (discussing the Paoly litigation and subsequent indemnification).

In this case, and in other cases involving extraterritorial conduct by executive branch officials, the government invariably asks the judiciary to defer to the executive as to sensitive matters of national security and public policy. But the jurists of the early Republic took the position that the interests of the United States were best served by a thoroughgoing commitment to the principle of remediation for the violation of individual rights. Thus, as Secretary of State during the Quasi-War with France, James Madison worked hard to ensure that aliens injured abroad by U.S. officials could seek redress in U.S. courts. *Letter from James Madison to Peder Blicherolsen* (Apr. 23, 1802), *in* 3 The Papers of James Madison, Secretary of State Series, 152 (D.B. Mattern et al. eds., 1995) (insisting that "injuries committed on aliens as well as citizens, ought to be carried in the first instance at least, before the tribunals to which the aggressors are responsible"); see generally Pfander & Hunt, *supra* p.

7, at 1895–97. Madison thought an effective judicial remedy in the courts of the United States was an important element of U.S. foreign policy.

Justice Story's opinion for the Court in the *Apollon* further underscores the importance of remedies for unlawful executive activity that takes place outside the borders of the United States. Rather than defer to claims of national security, public safety, and necessity, Story insisted that federal courts have a duty to provide suitable redress in these cross-border scenarios:

> It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.

Apollon, 22 U.S. at 366–67. To Story, the extraterritorial nature of federal official misconduct scarcely justified abandoning the presumptive commitment to judicial review as a necessary check on abuses of executive power. Other examples confirm that *The Apollon* accurately represents the presumptive personal liability that applied to federal officials throughout the antebellum period.[7]

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[7] *See* James E. Pfander & Jonathan L. Hunt, *supra* p. 7, at 1932–39 (2010).

The foundations for federal-official tort liability established by James Madison, Justice Story, and Chief Justice Marshall are evident in this Court's cases through the first half of the twentieth century. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 661–62 (1952) (Clark, J., concurring) (recognizing as good law the *Little* principle that a trespass is actionable when it is committed under executive orders without authority); *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940) (finding that federal officers can be personally liable for damages when they exceed their authority or "it was not validly conferred"); *Phila. Co.* v. *Stimson*, 223 U.S. 605, 619–20 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.") (citations omitted); *Belknap* v. *Schild*, 161 U.S. 10, 18 (1896) ("But the exemption of the United States from judicial process does not protect their officers and agents . . . from being personally liable to an action of tort by a private person whose rights or property they have wrongfully invaded or injured, even by authority of the United States.") (citations omitted); *Bates* v. *Clark*, 95 U.S. 204 (1877) (holding personally liable military officials who followed orders and wrongly seized private property they mistakenly believed was within Indian country). And the logic behind the time-worn system of liability and indemnity remains intact today, modified by the doctrine of qualified immunity. Officers acting in the line of duty were then—and are now—held responsible in the first instance to compensate the injured party, and the government can then absorb the loss by indemnifying the officer. Pfander & Hunt, *supra* p. 7, at 1888–1917, 1925. This historical tradition laid the foundation for *Bivens* v. *Six Unknown Named*

Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and recognition of Petitioners' right to sue would ensure modern constitutional tort jurisprudence remains faithful to founding-era principles.

III. *BIVENS* AND SUBSEQUENT ACTS OF CONGRESS, INCLUDING THE WESTFALL ACT, ARE CONSISTENT WITH THE HISTORIC REGIME OF ROUTINE REMEDIATION FOR CONSTITUTIONAL HARMS INFLICTED BY FEDERAL OFFICIALS.

When this Court decided *Bivens* in 1971, it was against the backdrop of the rich common law tradition detailed above. In fact, this Court found the federal damages-based cause of action that it recognized in *Bivens* "hardly . . . a surprising proposition" and the "ordinary remedy" for these sorts of constitutional violations by federal officers, notwithstanding the continuing availability of state common law remedies at that time. *Bivens*, 403 U.S. at 395. The federal government agreed as well. Br. for the Resp'ts at 40, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 1970 WL 136799, No. 301 (U.S. Nov. 24, 1970) (noting "the plan envisaged when the Bill of Rights was passed" allowed for a person suffering a constitutional injury to "proceed . . . by a suit at common law . . . for damages for the illegal act"). Although the mechanics have changed, courts applying *Bivens* to modern constitutional tort claims since 1971 have preserved the spirit of common law claims against government officials that existed under English and early American law. See, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979).

Shortly thereafter, in 1974, Congress began to endorse and ratify this Court's *Bivens* jurisprudence, solidifying its status as the preferred remedy for federal employees' constitutional torts. Congress amended the FTCA to add the federal government as a defendant in certain law-enforcement tort suits. 28 U.S.C. § 2680(h); see also *Carlson*, 446 U.S. at 19–20 n.5 ("[T]he congressional comments accompanying [the FCTA] amendment made it crystal clear that Congress views FCTA and *Bivens* as parallel, complimentary causes of action. . . . In the absence of a contrary expression from Congress, § 2680(h) thus contemplates that victims . . . shall have an action under FCTA against the United States as well as a *Bivens* action against the individual officials . . . .") (internal quotation marks and citation omitted). Concerned that victims of unlawful federal drug raids would be insufficiently compensated under *Bivens* and that *Bivens* actions may fail to adequately deter government wrongdoing, Congress believed that adding the federal government as a defendant would encourage institutional reform. What is clear, however, is that Congress took these measures to *supplement*, not replace, *Bivens* actions. S. Rep. No. 93-588, at 3 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2789, 2791 ("[T]his provision should be viewed as a counterpart to the *Bivens* case and its progeny . . . ."); James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 133 (2009) (noting that Congress rejected language proposed by the Department of Justice that "would have eliminated the *Bivens* action altogether in favor of suits against the government for constitutional violations").

Further strengthening *Bivens*, in 1988 Congress passed the Westfall Act. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. Its primary purpose was to preempt nonfederal remedies against federal employees acting within the scope of their employment. See Pfander & Baltmanis, *supra*, at 15. Responding to a unanimous ruling by this Court recognizing the continued viability of state tort claims against federal officers, *Westfall* v. *Erwin*, 484 U.S. 292 (1988),[8] Congress sought to both preserve and narrow the historic regime of common law remediation. To accomplish this goal, the Act grants immunity to the federal officer for claims not based on federal law and substitutes the federal government as a defendant under the Federal Tort Claims Act (FTCA). But the Act carved out a significant exception—for claims "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A).[9] By exempting claims "brought for a violation of the Constitution of the United States" from this immunity/substitution regime, the Act allowed *Bivens* claims to proceed against the responsible officer. See H.R. Rep. No. 100-700 at 6 (1988) ("Since the Supreme Court's decision in *Bivens*, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, [the Act] would not affect the ability of victims of constitutional torts to seek personal re-

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[8] That case held that absolute immunity did not shield federal employees from common law claims involving nondiscretionary duties.

[9] The second Westfall Act exception, § 2679(b)(2)(B), allowing suits against federal officials for violations of rights conferred by federal statute, does not apply here.

dress from federal employees who allegedly violate their constitutional rights."); see also 134 Cong. Rec. 15,963 (1988) (statement of Rep. Frank) ("We make special provisions here to make clear that the more controversial issue of constitutional torts is not covered by this bill. If you are accused of having violated someone's constitutional rights, this bill does not affect it. You might be individually sued."); Anya Bernstein, *Catch-All Doctrinalism and Judicial Desire*, U. Pa. L. Rev. Online, 221, 223–30 (2013) (exploring the interplay of Westfall Act transformation, substitution, and immunity). Congress effectively chose the officer suit, a remedy recognized in *Bivens* and reflected in centuries of common law development, as the mechanism best suited to remedy alleged constitutional tort violations.

In keeping with the common law tradition of applying the nation's own law to government activity outside the nation's borders, Congress has never sought to limit the routine remediation of constitutional violations to only those injuries occurring on U.S. soil. Unlike the FTCA, which explicitly exempts foreign torts from the statute's waiver of sovereign immunity, 28 U.S.C. § 2680(k), the Westfall Act does not exclude suits for violations of the Constitution that result in an injury overseas. The Westfall Act instead allows for all claims "brought for a violation of the Constitution of the United States" to proceed under the *Bivens* regime. By tying the right to sue to the existence of a constitutional violation, the Westfall Act makes clear that the *Bivens* action follows the Constitution in cases where the Constitution follows the flag.[10]

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[10] The presumption against extraterritorial application of rights conferred by federal statute, *see Kiobel* v. *Royal Dutch*

IV. OTHER INTERPRETIVE PRINCIPLES AND ANALOGOUS STATUTORY REGIMES REINFORCE THE AVAILABILITY OF A *BIVENS* REMEDY.

The argument for recognition of a *Bivens* action is further strengthened by two additional considerations. First, a well-settled presumption favors the availability of *some* adjudicatory forum to vindicate constitutional rights. Second, recognition of a right to sue under *Bivens* and the Westfall Act would ensure the parallel enforcement of constitutional limits on federal and state official action.

First, this Court has established a strong presumption that individuals alleging substantial constitutional claims should have at least one adjudicatory forum—judicial, administrative, or otherwise—in which to press their claim. *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (reading an implied exception for constitutional questions into federal statute to avoid the "serious constitutional question" that would arise if the statute were construed to preclude judicial review of constitutional questions); *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 680–81 n.12 (1986) (interpreting statute in a manner that "avoids the 'serious constitutional question' that would arise if we construed" the statute in question "to deny a judicial forum for constitutional claims"); *Johnson* v.

Petroleum Co., 133 S. Ct. 1659 (2013); *Morrison* v. *National Australia Bank*, 561 U.S. 247 (2010), has no application to the right to sue confirmed in the Westfall Act. *Cf. Meshal* v. *Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015), *petition for cert. filed*, (U.S. May 31, 2016) (No. 15-1461) (applying the *statutory* presumption to suits brought for allegedly *unconstitutional* federal official conduct in Africa). The Westfall Act does not create the rights in question, but confirms the right of individuals to sue for violations of the Constitution.

Robison, 415 U.S. 361, 366–67 (1974) (construing statute to avoid the "serious [constitutional] question[]" of the validity of barring federal courts from deciding constitutionality of veteran's benefits legislation). The Westfall Act makes clear that Congress has chosen the *Bivens* action (as opposed to state common law) as the proper vehicle for the vindication of constitutional rights in cases like this.

Congressional reliance on the *Bivens* action helps to bring federal official liability into line with the state official liability routinely available under § 1983. The two regimes already accord parallel treatment to a range of doctrines. When the Court clarifies the definition of a legally sufficient constitutional claim against a federal officer, the definition applies with equal force to state officers. See *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006) (specifying elements of malicious prosecution claims in *Bivens* litigation and describing *Bivens* action as the "federal analog to suits brought against state officials" under § 1983). When the Court refines the rules of qualified immunity, it does so recognizing that the rules will apply with equal force to state and federal officials. See *Pearson* v. *Callahan*, 555 U.S. 223 (2009) (treating *Bivens* and § 1983 decisions as interchangeable on subject of qualified immunity); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978) (noting that differences in immunity for state and federal officials are "untenable"). Moreover, "the qualified immunity analysis is identical" under *Bivens* and § 1983. *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). The Court's uniform application of qualified immunity suggests the balance between holding officials accountable for improper conduct and minimizing the tendency for personal liability to "dampen the ardor" with which officials perform their duties should be the same at the state and

federal levels. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813–14 (1982) (internal citation omitted).. Recognizing that Congress has ratified *Bivens* helps to further ensure equality of treatment of federal and state officials.[11]

Although § 1983 suits lack the threshold right to sue inquiry typical of modern *Bivens* actions, this Court has nonetheless recognized that other federal statutes and doctrines may narrow state officer liability. Incorporation of these standards into *Bivens* would help clarify and standardize public official liability. For example, implied statutory displacement in the § 1983 context might also extend to applicable *Bivens* remedies. See *Fitzgerald* v. *Barnstable School Comm.*, 555 U.S. 246, 252–55 (2009). In *Fitzgerald*, the Court held that the remedial scheme for harassment claims under Title IX did not displace the § 1983 remedy because Congress, in enacting Title IX, had expressed no legislative intent to displace § 1983 claims and had not put in place detailed or more restrictive remedies that would suggest the inapplicability of constitutional tort litigation. *Id.*

The *Fitzgerald* framework nicely accounts for the result in two *Bivens* cases—*Bush* v. *Lucas*, 462 U.S. 367, 388 (1983) and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). In *Bush* v. *Lucas*, the existence of a comprehensive and elaborate civil service remedial scheme ruled out a *Bivens* remedy to vindicate the violation of a civil servant's First Amendment rights. 462 U.S. at 388–89. Although the Court recognized that a *Bivens* suit could entitle him to a wider range of relief, the civil service remedies were "constitu-

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[11] For a more comprehensive articulation of this argument, *see* Pfander & Baltmanis, *supra* p. 14, at 139–41.

tionally adequate." *Id.* at 378 n.14. The Court relied in large part on Congress's "careful attention to conflicting policy considerations" in devising this "elaborate remedial system." *Id.* at 388.

In *Schweiker*, the Court again found a *Bivens* right to sue for procedural due process displaced by the sophisticated administrative review for Social Security benefit denial claims. 487 U.S. at 418–20. Not only did the plaintiffs receive significant monetary relief, but Congress imposed an exhaustion requirement that funneled disability claims through the administrative process and indicated that other modes of claims-related relief should be prohibited. *Id.* at 424–25; 42 U.S.C. § 405(h) (2006) (identifying administrative scheme as the exclusive mode of review for claims under the statute). Even though the alternative scheme did not provide redress for "the constitutional violation itself," it nonetheless was sufficient to supplant the *Bivens* right to sue. *Schweiker*, 487 U.S. at 427.

This Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), *overruled on other grounds by Daniels* v. *Williams*, 474 U.S. 327 (1986), imposes another important § 1983 limitation that fits well with federal official liability under *Bivens*. In *Parratt*, the Court held that the existence of post-deprivation remedies may obviate procedural due process claims for which § 1983 would otherwise provide a remedy. 451 U.S. at 543–44; *id.* at 538–41 (finding that state tort system provided remedy that vitiated underlying procedural due process claim). In *Schweiker*, the availability of specific relief and recovery of benefits owed could well provide the plaintiff with process constitutionally due under the Fifth Amendment. The same dynamic could apply to all *Bivens* procedural due process

claims—the Court need not reject the availability of such a remedy at the threshold to deny its specific application when post-deprivation remedies address the underlying constitutional claims.[12]

V. APPLYING THESE PRINCIPLES, PETITIONERS HAVE A RIGHT TO SUE MESA IN THE ABSENCE OF AN AVAILABLE ALTERNATE REMEDY.

Bivens and its progeny recognize that the existence of alternative modes of redress may displace the federal right to sue. Here, the *only* effective means of redress for the Petitioners would be a suit for damages under *Bivens*. No other remedy exists under domestic state or federal law,[13] and a foreign judgment against Agent Mesa would not be enforceable in U.S. courts, even if the courts of Mexico were to enter judgment against him.[14] The suggestion in the court below that a "judicially implied tort remedy under *Bivens* . . . is

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[12] For a more detailed discussion of the benefits of incorporating § 1983 standards into *Bivens* actions, see Pfander & Baltmanis, *supra* p. 14, at 141–50.

[13] The government implies in its Brief in Opposition that restitution owed to a victim's family accompanying a guilty murder verdict might be a sufficient remedial alternative. Br. at 12. But the refusal of the federal government to prosecute or extradite Agent Mesa moots any such claim.

[14] Although the *Wilkie* Court refused to recognize a *Bivens* action under the Fifth Amendment for retaliatory takings, numerous "special factors" were said to justify non-recognition. Here, there are no special factors that would justify overriding the right to sue. This is a familiar law enforcement context, with a well-developed body of law on which courts may draw from instructing juries and managing litigation. Courts are well versed in unreasonable seizures; as a result, this case presents few of the imponderables or practical challenges that led the Court to refrain from recognizing a right of action in *Wilkie*.

not and was not the plaintiffs' only source of review for this tragedy" finds no support in governing law, unless one stretches the concept of "review" to include internal review of Mesa's conduct within the Department of Justice. *Hernandez* v. *United States*, 785 F.3d 117, 133 (5th Cir. 2015) (en banc) (Jones, J., concurring) (per curiam).

A. No Available Alternative Remedy Under Domestic Law.

Petitioners could not prevail in a claim against the federal government under the FTCA. As discussed above, claims under the FTCA against the federal government are sometimes available as a congressionally approved supplement to the remedies available under *Bivens*. However, claims "arising in a foreign country" are explicitly barred under the FTCA. 28 U.S.C. 2680(k); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004) ("[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."). The extraterritorial nature of the injury would preclude Petitioners from successfully recovering damages under the FTCA.[15]

State law likewise provides no opportunity for redress because the Westfall Act forecloses any law-

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[15] Petitioners did not retain an alternative remedy via review of the Attorney General's scope-of-employment certification. *Cf. Hernandez*, 785 F.3d at 132–33 (Jones, J., concurring) (citing *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995)). Absent any indication that Agent Mesa was acting outside the scope of his official duties, a state law claim can hardly be considered a viable alternative remedy under this Court's cases.

suits against federal officers based on state law.[16] If Petitioners were to file a Texas state law claim against Mesa, the Westfall Act would require the substitution of the federal government as defendant and transformation of the state law claim into an FTCA claim. As discussed above, the extraterritorial nature of Mesa's acts would require the court to dismiss the transformed claim under the FTCA. The same process would unfold if Petitioners were to bring a claim based on Mexican law in a U.S. state or federal court.

B. Any Foreign Judgment Against Mesa Would Not Be Enforceable In A U.S. Court.

Petitioners would be left without actual redress if they won a judgment against Agent Mesa in a foreign court and sought enforcement of that judgment in state or federal court. Although the federal government's refusal to extradite Mesa may bar Mexican courts from exercising jurisdiction over civil claims against him, it is conceivable that the direct and indirect effects of an officer's conduct could serve as sufficient basis for a foreign court to exercise jurisdic-

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[16] Although *amici* have debated the scope of the Westfall Act immunity, we agree that, if the Westfall Act is read to preclude state law remedies for constitutional violations, the Act contemplates that *Bivens* claims will be broadly available to remedy constitutional violations by federal officials. Compare Vázquez & Vladeck, *supra* p. 7, at 577–82, *with* James E. Pfander & David P. Baltmanis, *W(h)ither* Bivens? 161 U. Pa. L. Rev. Online 231, 236–42 (2013). This brief assumes that the Westfall Act precludes state remedies for constitutional violations by federal officials. *Cf. Minneci* v. *Pollard*, 132 S. Ct. 617, 624 (2012) ("Prisoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government." (citing Westfall Act, 28 U.S.C. §§ 2671, 2679(b)(1))).

tion.[17] Even so, no federal statute provides for the courts of the United States to recognize and enforce any hypothetical judgments that the Petitioners might secure in the courts of a foreign country. Any suit to enforce the foreign judgment would thus fall within the scope of Agent Mesa's Westfall Act immunity from suit. See 28 U.S.C. § 2679(b)(1) ("Any other civil action or proceeding for money damages [aside from that permitted against the federal government] arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred."). If such a suit were brought, and transformed into an action against the government under the FTCA, it would run afoul of the preclusion of liability for injuries that occur outside the United States. A foreign judgment that Petitioners cannot likely obtain in Mexico and cannot in any case enforce in the courts of the United States cannot provide an "alternative remedy" that displaces a *Bivens* right to sue.

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[17] For the purposes of our discussion, we assume Petitioners may have an actionable claim in a Mexican court. This assumption is not intended to refute the claims by Petitioners and other *amici* that no redress is available in Mexican courts.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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